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Letter dated 14 July 2005 from the Secretary-General addressed to the President of the Security Council

Further to my letter of 24 June 2005 (S/2005/458) to the President of the Security Council transmitting the final report of the Independent Commission of Experts to review the prosecution of serious violations of human rights in Timor-Leste (then East Timor) in 1999, I have the honour to submit to you herewith letters from the President of Timor-Leste, Kay Rala Xanana Gusmão, and the Prime Minister, Mari Alkatiri, addressed to me which contain their comments on the Commission's final report (see annexes I and II). It is my intention to issue the report and the comments of the Government of Timor-Leste as a document of the Security Council.

I should be grateful if you would bring the annexed letters to the attention of the members of the Security Council.

(*Signed*) Kofi A. **Annan**

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Annex I

Letter dated 22 June 2005 from the President of Timor-Leste to the Secretary-General

I am writing in appreciation of your efforts in appointing a three-member Commission of Experts charged with the responsibility of reviewing the judicial processes in Timor-Leste and Indonesia and of recommending "legally sound and practically feasible measures so that those responsible are held accountable, justice is secured for the victims of Timor-Leste, and reconciliation is promoted".[1]

You further charged the Commission of Experts to "consider ways in which its analysis could be of assistance to the Commission for Truth and Friendship that the Governments of Timor-Leste and Indonesia have agreed to establish".

Taking note of the report of the Commission and recalling the above-mentioned terms of reference, the Democratic Republic of Timor-Leste wishes to make both general and specific comments in relation to certain elements of the said report.

General comments

The elected leaders of Timor-Leste are part and parcel of the history of our people. We bear the scars of their suffering and share their desire for justice and accountability. Each of us has profound personal convictions, and is well apprised of our own constitutional objectives to build a country based on the will of the people, democratic principles, respect for human dignity, justice and accountability.

In accordance with the will of our people, we are committed to justice and have taken the following decisive actions that evidence this:

- We cooperated with the inception of the United Nations-initiated serious crimes process in Timor-Leste;
- We established the Commission on Reception, Truth and Reconciliation, which has done exemplary work in interviewing over 7,000 people and in supporting the reconciliation and reintegration of dislocated individuals back into their communities;
- Among our first parliamentary acts, we ratified the seven core international human rights conventions, and we are working steadfastly to report on our compliance with these.

Entrusted with governing the nation, enhancing its embryonic institutions, maintaining law and order and preserving our hard won independence, we are also mindful of the complex internal and external challenges inherent in our task.

In our pursuit of justice, we must be sensitive to the need of establishing a balance between justice and national reconciliation in order to avoid perpetuating the divisions of the past and exacerbating existing cleavages in our society. We must also be cognizant that, for Timor-Leste, justice and accountability do not fall exclusively within our national jurisdiction. That, for us, justice is encumbered by external realities.

[1] Terms of reference.

While it might be "politically correct" to pursue justice at any cost, ignoring the political reality in our immediate neighbourhood, where the elected leaders have shown themselves to be genuinely committed to pursuing a prudent path of reforms, would amount to irresponsible demagogy. Indeed, it has been said before that, "the emphasis in the duty to prosecute and punish those guilty of human rights abuses stems from a post-World War II model for prosecuting war criminals does not adequately deal with perpetrators who still wield considerable power".[2]

The elected leaders of the new Timorese nation are sensitive and sympathetic to the complex challenges of the transition to democracy in the world's most populous Muslim nation.

Even the mandate of the Commission of Experts is cognizant of the need to balance ethical and legal considerations with pertinent political realities. And yet the Commission's draft report, as we had feared, recommends the establishment of an International Criminal Tribunal under Chapter VII of the Charter of the United Nations, thereby failing to recognize political realities.

The view of the Democratic Republic of Timor-Leste on this issue is well known and is a matter of public record. In our considered view, real or perceived excessive outside pressure on the elected civilian leaders of the new Indonesia to meet the expectations of the international community for credible punishment in the form of possible jail terms for senior military officers would inevitably result in unrest within the Indonesian armed forces. This in turn would undermine stability and the democratic experiment of the world's largest Muslim country. Ultra-conservative, nationalist, pro-Suharto elements and radical Muslims would not hesitate to instigate sentiments against a perceived Western or United Nations-led "campaign" against Muslim Indonesia.

In each case of past or ongoing international tribunals, coercive legal actions have been imposed on defeated parties. Where there were stalemates on the ground and the end of the conflict was brought about through negotiations there was never a resulting international tribunal.

On this, the experience of Mozambique is instructive. There, the brutal war waged by RENAMO and supported by the then racist South African Government ended in the early 1990s through protracted negotiations. Yet in Mozambique today, RENAMO is a major political force and its main leader is a legitimate opposition figure.

It is useful to recall that in 1999, in spite of perilous political conditions, Indonesian leaders, both civilian and military, displayed much pragmatism in putting an end to the 24-year presence in Timor-Leste. You may recall that it was none other than the current Indonesian President, Susilo Bambang Yudhoyono, who negotiated — with yourself and your senior representatives in New York — the arrangements for the Security Council-mandated INTERFET to land in Timor-Leste in September 1999. We must acknowledge that the circumstances of Indonesia's final withdrawal from Timor-Leste were traumatic and yet they displayed much

[2] Zalaquett, J., "Confronting human rights violations committed by former governments: principles applicable and political constraints" in Kritz, Neil J., ed. *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, vol. 1, United States Institute of Peace, Washington, D.C., 1996, p. 204.

courage and statesmanship in honouring the terms of the 5 May Agreement and soon after walked half-way to meet Timorese leaders to reconcile.

Today, relations between our two countries are on a sound footing due to our common determination to look forward not backward, even if the recent tragic past cannot be glossed over. And indeed, you have offered many wise words with regard to reconciliation and the enhancement of our relations with all our neighbours. We have heeded your wise advice.

Specific comments

Timor-Leste is disappointed that the Commission of Experts has failed to provide the international community with "legally sound and practically feasible measures so that those responsible are held accountable, justice is secured for the victims of Timor-Leste, and reconciliation is promoted" and has not been instructive in its mandated responsibility to "consider ways in which its analysis could be of assistance to the Commission for Truth and Friendship that the Governments of Timor-Leste and Indonesia have agreed to establish".

We had entertained high hopes that these eminent scholars would provide us with "legally sound and feasible" recommendations for the advancement of the investigations of serious crimes committed in Timor-Leste and for the enhancement of the proposed Commission for Truth and Friendship process.

Instead, the report reiterates the already well known shortcomings of the two successive United Nations missions in Timor-Leste (UNTAET and UNMISET) in bringing the true perpetrators of the 1999 violence to justice and further laments the domestic judicial process that the authorities of the neighbouring Republic of Indonesia have undertaken.

The report's recommendations also go on to assume that the Government of Timor-Leste would not agree with a Tribunal under the auspices of the United Nations,[3] an assumption that is contrary to the Government's previously stated position,[4] though it is certainly true that the Timorese Government does not favour an outcome where the burden of a serious crimes process is transferred to us.

Indeed, our Constitution expressly states that "the collective judicial instance existing in East Timor, integrated by national and international judges with competencies to judge serious crimes committed between the 1st of January and the 25th of October 1999, shall remain operational for the time deemed strictly necessary to conclude the cases under investigation". And it was a Security Council decision[5] that required that all Serious Crimes Unit investigations be finalized by November 2004 and that all trials and other judicial activities be completed by 20 May 2005.

Perhaps most pertinently what the report of the Commission truly fails to do is to consider the ways in which its analysis may assist both Governments in enhancing their agreed commitments and to elaborate on proposed mechanisms to advance progressive achievement of agreed objectives of the Commission for Truth and Friendship.

[3] Commission of Experts report, para. 92.
[4] Commission of Experts report, para. 90.
[5] Security Council resolution 1543 (2004).

The Commission for Truth and Friendship was established as part of a policy of truth-seeking, accountability and reconciliation pursued by both Timor-Leste and Indonesia. Its mandate "does not prejudice the ongoing judicial process with regard to cases of human rights violation, in Timor-Leste in 1999, nor does it recommend the establishment of any other judicial body".[6]

The President of the Republic met and discussed with the leaders of all political parties the advantages and, of course, the shortcomings of the Commission for Truth and Friendship. The Senior Minister and Minister for Foreign Affairs and Cooperation met with all parliamentary leaders, with the three eminent Bishops — Dom Carlos Ximenes Belo, Dom Basilio do Nascimento and Dom Alberto Ricardo da Silva — as well as with a number of Timorese non-governmental organizations that represent victims and vulnerable groups. Notably, one of the most significant groups, the Association of Former Prisoners, quite strongly endorsed the Government's proposal.

As commentators have argued,[7] a criminological-type deterrence theory is ill-equipped to deal with the more profound issues of "learning from history" that arise in particular cases of social reconstruction. And yet, the rhetoric of reconciliation stems from a belief that punishment is unproductive in solving social conflicts and that accountability need not be articulated strictly from a crime perspective or exclusively based on justice but may be an instrument of social policy that is designed to achieve a particular set of outcomes.[8] Indeed, in a highly polarized society a certain degree of forgiveness may be necessary to rebuild the social corpus.

The proposed Commission for Truth and Friendship is unique, as it constitutes a bilateral body. Never before in history have two sovereign States determined to operate a truth commission. Such a mechanism cannot satisfy everyone and, indeed, does not seek to do so. It is not designed to grant impunity; yet it recognizes the need for justice as well as the need to rebuild our respective nations. The Commission for Truth and Friendship is charged with examining serious acts of violence whose impact on our societies is such that the public has the right to know the truth. In this the Commission for Truth and Friendship is charged with taking account of and confronting a troubled past but is tasked to do so without destabilizing our fragile democracies.

The Commission for Truth and Friendship can establish an overall picture of the patterns of human rights violation within the State institutions and can contribute towards the future with specific recommendations for reform.[9] It can consider the broader context in which human rights violations occurred and the structural elements of government, judiciary, security forces and society that made these violations possible — a context that would not be possible to achieve in a

[6] Terms of reference of the Commission for Truth and Friendship.

[7] Cohen, S. 1995 "State crimes of previous regimes: knowledge, accountability, and the policing of the past", *Law and Social Inquiry*, vol. 20/1, 1995, p. 18.

[8] Bassiouni, M. C., 1996, "International crimes: jus cogens and obligation erga omnes", *Law and Contemporary Problems*, vol. 59, No. 4, p. 23.

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criminal trial.[10] In the more general context of Indonesia's transition to democracy, it will be able to make recommendations on the functioning of its institutions.[11] It can consider the concerns of the Commission of Experts with regard to the independence of the judiciary and the means by which to restructure the military.

You and many of our friends at the United Nations understand the fragility of both our nascent democracies, and the need to find a balance between competing principles, which are, on the one hand, the unassailable duty to bring the perpetrators of violence to justice and, on the other, the unassailable right of the peoples of Timor-Leste and Indonesia to achieve long-lasting peace, genuine democracy and stability.

Timor-Leste is heralded as one of the United Nations "success stories", which is due, in no small part, to your wise leadership. So too must it be remembered that the good faith and cooperation shown by the Indonesian leaders since September 1999 has done much to realize the much talked about "United Nations success story".

Our two nations are undergoing profound democratic and political transformations. The Commission for Truth and Friendship is a testament to the democratic and political will of both nations and it can be perceived as a progressive reform mechanism. Through this mechanism, democratic consolidation can be further enrooted.

The Commission for Truth and Friendship is not a final phase of justice. Over time, as both nations mature democratically, people's need for justice will be met. There is, after all, no statute of limitations for such crimes. As nations become more politically mature, past grievances and past wrongs can often be righted. Examples of this abound across the world and they enlighten and inspire us. For now, both nations strive to move forward in a spirit of friendship and it is with courage and humility that we will attempt to revisit the events of the past, respecting our own peoples' right to know the truth.

We trust that you will once again demonstrate understanding and faith in us, and that you will respect what we are engaged to achieve for the many victims of our nation and that you will be attentive to the restraints that bear down on us.

The people of Timor-Leste have waited 500 years for their freedom. And now we have patience and faith that our Indonesian brothers and sisters will continue their admirable struggle to achieve democracy and justice.

(*Signed*) Kay Rala Xanana **Gusmão**

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[10] Morris, M. H., 1996, "International Guidelines against impunity: facilitating accountability", *Law and Contemporary Problems*, vol. 59, No. 4, pp. 29-39.

[11] The Commission for Truth and Friendship is mandated to devise ways and means as well as to recommend appropriate measures to heal the wounds of the past, to rehabilitate and restore human dignity.

Annex II

Letter dated 22 June 2005 from the Prime Minister of Timor-Leste to the Secretary-General

I am writing in appreciation of your efforts in appointing a three-member Commission of Experts charged with the responsibility of reviewing the judicial processes in Timor-Leste and Indonesia and of recommending "legally sound and practically feasible measures so that those responsible are held accountable, justice is secured for the victims of Timor-Leste, and reconciliation is promoted".[1]

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Entrusted with governing the nation, enhancing its embryonic institutions, maintaining law and order and preserving our hard won independence, we are also mindful of the complex internal and external challenges inherent in our task.

In our pursuit of justice, we must be sensitive to the need of establishing a balance between justice and national reconciliation in order to avoid perpetuating the divisions of the past and exacerbating existing cleavages in our society. We must also be cognizant that, for Timor-Leste, justice and accountability do not fall exclusively within our national jurisdiction. That, for us, justice is encumbered by external realities.

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The people of Timor-Leste have waited 500 years for their freedom. And now we have patience and faith that our Indonesian brothers and sisters will continue their admirable struggle to achieve democracy and justice.

(*Signed*) Mari Bin Amude **Alkatiri**
Prime Minister

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